

MINUTES
REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS
Monday, November 21, 2005, at 9:00 a.m.
DPHHS AUDITORIUM, 111 Sanders, Helena

PRESENT: Governor Brian Schweitzer, Attorney General Mike McGrath, Secretary of State Brad Johnson, State Auditor John Morrison, and Superintendent of Public Instruction Linda McCulloch

Motion was made by Mr. Morrison to approve the minutes from the regularly scheduled meeting of the Board of Land Commissioners held October 17, 2005. Seconded by Mr. Johnson. Motion carried unanimously.

BUSINESS TO BE CONSIDERED

1005-10 PINNACLE GAS RESOURCES – DIETZ CBNG WELL DRILLING APPLICATIONS

Ms. Sexton said this item came before the Board last month. There have been several presentations regarding the Pinnacle Resources Dietz Coal Bed Natural Gas well drilling application, located NE of the existing CX Field. There would be a completion of 161 coal bed natural gas wells, 24 of which would be on state property. There will be one well drilled per 80 acres per horizon. There were two letters received, one from Tongue River Water User's Association, Brenda Lindleif Hall, and a response from Pinnacle to that letter.

Brenda Lindleif Hall, Tongue River Water Users Association, said a couple of points in response to the letter that Pinnacle Resources sent. They apparently read my letter sent on behalf of the Tongue River Water Users Association and say that the TRWUA was asking the Board to withdraw approval on that POD. That is not the case. The TRWUA simply wished to inform the Board of some of the underlying legal issues and its position that although the state Environmental Impact Statement (EIS) hasn't been challenged, the federal EIS has been challenged and held unlawful. As to the federal portion, it is one whole document prepared to comport with all the laws, federal and state laws, and the TRWUA doesn't believe that a Environmental Assessment (EA) that tiers to that FEIS is very strong legal footing. We just simply don't believe there has been sufficient environmental analysis. One final point, the Coal Creek POD EA has been challenged in court, is currently in court, and I don't think there has been a ruling on that. But the validity on the EA is in question and I felt it was important for the Board to understand that.

Chris Mangen, Attorney for Pinnacle, said the EA is on perfect, solid, legal grounds. There was a Record of Decision and it was never appealed. That is the end of it. Phased development, which is what the federal case is based on, is addressed in Tom Richmond's [Board of Oil and Gas Conservation] EA. Phased development doesn't work under Montana law, Tom considered it and there is implicit phased development, he discusses it right in his EA. As for the Coal Creek case, yes, we had a hearing in that case. The evidence presented was that some of the coal bed methane water has to be taken out of the coal seams to relieve the pressure and produce the coal bed methane. Not all of the water is taken out. The water is not being used for any other purpose. That water is brought to the surface, treated to drinking water standards and made available to anybody who wants to use it. If nobody wants to use it, it is put into the Tongue River. But it is treated to drinking water quality standards. Judge Jones in that case essentially found that failing to appeal the EA or the fact that administrative remedies had not been exhausted, no injunction was appropriate at that point and the case is on appeal to the Montana Supreme

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Court. The Montana Supreme Court has issued an order refusing to grant any sort of injunction on appeal because there is no risk of imminent harm. We expect to win on appeal.

Governor Schweitzer said treating to drinking water standards, which means what in terms of SAR?

Mr. Mangen said it means that you and I can drink it and ...

Governor Schweitzer said no, in terms of sodium absorption ratio? I am very frustrated with those in industry who confuse SAR with the ability to drink it. Of course you can drink it, a lot of us grew up in Eastern Montana on sodic water. The question isn't drinking quality, the question is SAR. Obviously it is drinking water quality, but the concern of the ranchers out there is they want that water for their livestock to drink.

Mark Deibert, Western Lands Services, said according to the discharge permit any treated water that leaves the treatment facility located on Coal Creek has to meet discharge standards which during irrigation periods has a SAR of 2.

Mr. Johnson said has staff changed their position with regard to Record of Decision on this matter?

Ms. Sexton said no, they have not.

Motion was made by Mr. Johnson to approve the Plan of Development. Seconded by Ms. McCulloch.

Governor Schweitzer said we have 161 permitted wells, 24 are on state land. My question is, if we are drilling around the state land and we are decreasing the pressure of that coal bed seam and drawing the gas off, if we don't allow those 24 wells on state land do we get any revenue? Is there any revenue-sharing?

Ms. Sexton said no. There would not be any revenue-sharing.

Governor Schweitzer said so we would draw no revenue. The point is if we were to deny this then I presume 161 minus 24 wells would be put in place, they would release the pressure, and probably we would get no revenue, but gas might move.

Ms. Sexton said that's correct.

Mr. Morrison said we have an obligation to do this consistent with our revenue-generating responsibilities, but we are going to be watching it very closely to find out whether the evaporation units work, find out whether the residual salts are disposed of properly and whether it is consistent with our long term stewardship responsibilities. If it is not, then we are going to have to exercise that much more scrutiny and put that much more into precautions the next time this kind of proposal comes along. I believe we are going to approve this and we need to, but Pinnacle and everybody else in the CBM business needs to take notice of the responsibility that goes with it.

Governor Schweitzer said I'd like to echo that. When we looked at it last time I did a little math and questioned whether we would have enough evaporation to take care of all the water in those pits and that all of it would remain there even on windy days when we are shooting it in the air. If it works it is a great solution and it is something we will be able to use. If it doesn't work, then we will be asking some more questions.

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A vote was taken on the motion on the floor. It carried unanimously.

Ms. McCulloch said at the end of last week it came to my attention that there was some scurrying around of folks worried about how the vote was going to go on this bill, I think arising from some conversation questions that might have been asked at the staffers meeting. At the end of last week, I was dealing with school funding, I was dealing with No Child Left Behind negotiations, I do not have time to deal with gossip and innuendoes or any of that. If, in fact, there are questions about somebody feeling that maybe somebody is changing their mind, would you please call? My office number is public, my home phone number is public. Call and we can talk. But I do not have time to deal with this kind of stuff that goes on at the last minute. Please call.

1105-1 BECKMAN WMA DONATION (FWP)

Ms. Sexton said this is the Beckman WMA/Barber Property donation. It is a proposal to accept a donation of 1674 acres.

Glen Erickson, FWP Field Services Division, said I bring to you a proposal to accept a donation from the Beckman Estate of 1674 acres of property, the Barber property near Denton, Montana. It is going to be added to our Beckman Wildlife Management Area which is in the same location, about 4800 acres right now. This particular area is mule deer habitat and of course has hunting access, it has a lot of upland game birds associated with the riparian zone and some of the grasslands. It is the breaks-type habitat that flows into the Judith River, a very pretty area, an area that is important to wildlife and to the sportsmen of Montana. Mr. Beckman passed away in 1997 and in his Last Will and Testament he instructed that there should be lands found in the Fergus County, Judith Basin, or Meagher County area associated with mule deer habitat and hunting for sportsmen. We did a search for that area and found three properties early on and they were purchased in 1999, 2000, and 2002. Recently we found the Barber property was available for purchase and it fills out the estate funding. This purchase will be the last donation to the FWP by the Beckman Estate. It is fee title and a donation with Habitat Montana money to finish out the class associated with purchasing the property. We had a draft EA produced, a management plan, a socio-economic study, we had 25 comments most were in support. There were some negative comments about government ownership of land and we dealt with those as we have in the past, FWP does pay taxes to the counties and we will be managing it such that the agricultural production and uses of the property will continue because they are a benefit to the wildlife. Mr. Erickson asked for approval of the donation of the Barber property which will be added to the Beckman WMA.

Motion was made by Mr. Johnson. Seconded simultaneously by Mr. McGrath and Mr. Morrison. Motion carried unanimously.

1105-2 DISCLAIMER OF INTEREST – SETTLEMENT AGREEMENT, STOCKMAN BANK
v. ASBECK

Ms. Sexton said Stockman Bank has brought a suit to quiet title to lands adjacent to the Yellowstone River, approximately six miles NE of Sidney. The suit was filed in district court, the settlement agreement is only with Stockman Bank. The bank and the state are proposing to issue mutual disclaimers of interest to one another for their respective land. The particular parcel that the state is claiming title to is due to a state island arising between the low water marks in the Yellowstone River. It is believed by

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the department that Stockman Bank has good title to Parcel A. The department believes it owns Parcel B. With the disclaimers the parties are also agreeing to grant reciprocal easements. There is, along Section 5, a dotted line, it is a road which is not designated right now as a county road but it does cross part of Parcel A so there will be a reciprocal access agreement. The state gets access along that road, the bottom of Parcel A. There is an irrigation ditch that heads north from that parcel and there is a maintenance and operation road along that ditch which is on the state side (Parcel B) of the irrigation ditch. That is the reciprocation we would grant to them for access. The state is not claiming Parcel C unless it wants to visit with North Dakota. Should the court rule that Parcel C is owned by the bank the settlement agreement provides that the state grant the bank access to Parcel C in consideration of this settlement agreement. On Parcel C we will have to see what is determined as ownership but we are disclaiming any interest in North Dakota. The department has reviewed the factual allegations within the complaint and has concluded the state has no possible claim to these disputed lands, Parcel A and C. We request the Board's permission to execute the enclosed settlement agreement and file the disclaimer of interest to Parcels A and C to help resolve the quiet title action.

Governor Schweitzer said that road is not a county road?

Ms. Sexton said at this point it is not determined to be a county road.

Governor Schweitzer asked if the state had egress-ingress rights across that road, across Parcel A, if it has been used over the years? If a use pattern has been established you can use it.

Monte Mason, Bureau Chief Mineral Management Bureau DNRC, said by the Stockman Bank granting us a reciprocal easement we are covered both ways. We have an easement across their property if it is not determined to be a county road. If it is a county road we've got access. It simplifies the situation, you don't need to argue historical use.

Governor Schweitzer said I would like to know whether we are getting something in return. If we already have access to that property, legal access, I don't have a problem with quieting title but I do have a concern we are offering reciprocal egress-regress when in fact we may already have our access. What do we get out of the deal?

Mr. Mason said we have not been actively using that parcel. It is an island growing up out of the bed so there isn't a history of us using that parcel.

Mr. McGrath said what we get is Parcel B.

Mr. Mason said that's correct.

Governor Schweitzer said don't we already have Parcel B, we just don't have access to it?

Mr. Mason said without this settlement Stockman Bank claimed ownership of Parcel B. That's part of the settlement agreement. We have convinced them we have a superior claim versus Stockman bank and that is the settlement agreement. We disclaim interest to Parcel A and Parcel C. They disclaim the interest they previously asserted to Parcel B.

Tommy Butler, Legal Counsel DNRC, said I think the answer to your question about whether the state has prescriptive rights over Parcel A and B is simply answered by saying we have no factual basis for

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making that assertion. We looked at all the questions of title and egress-ingress and determined this was the best outcome we could settle with the bank.

Governor Schweitzer said I still have a difficult time with the State of Montana giving easements and getting less in return. This may not be that case. We've had a number of them come to us from private groups suggesting they will give us easement if we give them easement and this may not fit that case but that's why I was asking those questions. If we already have easement, if we already have a legitimate claim to Parcel B and we think it is a strong claim, I am not sure we want to give anything up. But what you're saying is that we have to win this battle and it may be as good a deal as we can get without having to litigate, that's what I want to establish.

Motion was made by Mr. McGrath to execute the settlement agreement and approve the disclaimer of interest. The opportunity to quiet title to clarify who owns what and to clear the access issues is a plus for the state. Seconded by Ms. McCulloch. Motion carried unanimously.

1105-3 SET MINIMUM BID FOR LAND BANKING PARCEL

Ms. Sexton said this is to set minimum bid for land banking parcel. In July 2005 the Board set the minimum bid for sale for parcel #340, which is comprised of 160 acres located in Montana City, Jefferson County. The appraisal was performed by the DNRC staff appraiser and the department recommends the minimum bid be set at the appraised amount of \$3100 per acre. Once the minimum bid is set we notify those parties required by rule including the surrounding landowners. There is a section in the administrative rules which states if a person does not like an appraised value of a parcel they may, at their expense, get a second appraisal done. They would have to notify the department within 15 days and any subsequent appraisal would have to be completed within 60 days of notification to the department. Upon receipt of the minimum bid notification letter from DNRC, but beyond the 15 day notification period, one of the adjacent landowners objected to the appraised value as being too high and requested that an appraiser be hired to conduct a second appraisal. The department consented. After DNRC review of the second appraisal it concluded that the appraised value be revised to \$2800 per acre. The second appraisal provided a value of \$1500 per acre, we reviewed that appraisal and determined the cumulative effects of the deficiencies and issues outlined in the review, such as the inadequate explanation of comparable sales, water, and the unsupported weight given to subdivision and topographic issues, resulted in a questionable appraisal report. The second appraisal reviewed by the department we found was questionable in valuing the subject property. The department continues to update its land banking website to provide the public with the most current information. The public may contact DNRC or the Board verbally or in writing with future comments. Our agency recommendation at this point is to have the minimum bid at \$2800 per acre, down from the \$3100 per acre in July. The second appraisal was at \$1500 per acre. Again, the Board set the minimum bid in July. Ash Grove requested beyond the time allowed that a second appraisal be completed. On review of the second appraisal, the department felt the value of the land was too low and there was the question about road access and the department determined that this parcel does have legal access. There is legal access on this road. It is our recommendation we set the minimum bid at \$2800 per acre.

Chris Johnson, Ash Grove Cement, said our first issue is relative to the appraisal and the appraisal situation. We have submitted correspondence to DNRC relative to the appraisal review. Ash Grove did indeed request a second appraisal. That appraisal review of the second appraisal was done by the original appraiser and we feel and it is our position that that is an inherently flawed situation. This is not an attack or complaint relative to that appraisal review but we believe and it is our opinion that an independent

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appraisal review should have been done. We're not talking about a third appraisal of the property. We are talking about a technical appraisal review to see which appraisal best followed established appraisal procedures and just to pass on the relative merits of each appraisal in that regard. Again, it is not a third appraisal. We requested this of DNRC and I had lined up somebody I was hoping we both, DNRC and Ash Grove, could approve or could agree to have this third party do that appraisal review. They rejected that request. The thing relative to the appraisal review is the Montana Supreme Court, in dealing with another Land Board issue, mentioned they are reluctant to overturn any discretionary decisions of this Board. But mentioned very strongly an independent appraisal is an essential element of all the work that is done here. I think by definition we lose some of that independent appraisal flavor when the appraisal review is done by the initial appraiser. If a second appraisal disagrees with the first appraisal, I think the tendency to defend your original work product is pretty significant.

Ash Grove's concern about this is, and they are not just an adjacent property owner they are surrounding property owner, this property is land locked and completely surrounded by Ash Grove property, and their concern or interest in this is one of trying to be a good neighbor. They have made it a policy in the past to try and acquire as much as the surrounding property as they can so they don't end up with neighborhoods, houses, subdivisions or other parties who can potentially complain about the existence of the facility. It is a reality. All of a sudden preexisting uses can become the offending uses. That has been a concern of Ash Grove and they have tried to acquire property surrounding the facility for this purpose. Ash Grove is interested in the property and obviously interested in the lower initial appraisal value on it. We also think the second appraisal is defensible and we would like to see an independent appraisal review done of both of those appraisals.

The second issue that was mentioned is the issue of access. There is a road into that area and it is called Microwave Hill Road. With all deference to the Jefferson County Commissioners, I don't think it is a county road. They established this as a county road by resolution in 2001. That resolution cited to the statute and that resolution by definition the statute refers to, is an adoption by the county of existing public right-of-ways. In other words, just by adopting a resolution they cannot create a public road. Not by the mechanism they referred to in that, that would otherwise be called an uncompensated taking or a condemnation that didn't follow proper procedure, one of the two. I have done a lot of research and part of the problem associated with this road is trying to prove a negative, trying to prove that somewhere in the past this was never created as a public right-of-way. I have found nothing in my research. It is our belief that, and there is record to support this, that road was installed for the express purpose of accessing the AT&T microwave tower site that is to the east of the state land, and a parcel totally surrounded by Ash Grove property, it is an in holding. I have reason to believe AT&T installed that road, and that AT&T used that road. There was a private easement granted to AT&T shortly after they acquired the property. There is no record of how this became a public right-of-way. The initial resolution by which Jefferson County "adopted" this as a county road was flawed. As part of that adoption that was a long process for Jefferson County trying to figure out what their roadways were. We think there is a significant access issue in this and it's been our goal to try not to fight about it but it may come to that. If Jefferson County continues to insist that that is a public right-of-way then there is probably only one way to resolve it and that is to have a judge rule on it in a declaratory judgment action. We'd like to avoid that. One of the things we'd like to see as part of this process is additional time to resolve these issues. We feel we've gotten some hearing and the DNRC staff has been receptive to some of the stuff but we think there are significant issues that remain unresolved at this time.

Mr. Morrison said what is the best way to make sure we have an independent appraisal and review?

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Chris Johnson said I think it is certainly within appraisal standards for a staff or an employed person at DNRC to do "an independent" appraisal. The USPAP standards certainly allow for that and assume that any appraiser is acting independently. The other thing that is different is there is no definition within Montana law defining what an independent appraiser is, but a back handed definition in the appraisal statutes that identifies that somebody who provides an independent appraisal for a fee has to be a licensed appraiser before they can sue for that fee. Well, if you are employed by the person you are doing the independent appraisal for, you wouldn't be suing to collect your fee. It presumes that an independent appraisal is done by somebody who is not an employee.

Mr. Morrison said mechanically how is that person selected?

Chris Johnson said the second appraisal we got was from a short list provided from DNRC of appraisers available.

Mr. Morrison said it was somebody you contracted?

Chris Johnson said yes we had to. With that short list it really boiled down to who could do the appraisal. There was only one person available to do it within the time period, Mr. Joki.

Mr. Johnson asked does your appraisal assume the position you have expressed with regard to access? That there is not access?

Chris Johnson said the appraiser in that appraisal did not address the access issue in his valuation. I sent him a letter giving him an opinion when my preliminary indications were I couldn't find any basis for it being a valid county road. He submitted a note that said if this property doesn't have access then this appraisal is considerably out of whack.

Mr. McGrath said so it would be lower than \$1500?

Chris Johnson said yes. Again, I think he made it clear in his appraisal that it did not include the property was land locked or did not have proper access.

Mr. Morrison said if he assumed that it was accessible, how do you explain a difference between \$448,000 and \$240,000? That is pretty radical.

Chris Johnson said I can't because I am not an expert in this area. Assuming there is a flaw in one of those appraisals, I'd bring an expert to try to hash out the flaw. The review is of the appraisal standards, not necessarily a third appraisal.

Mr. Johnson said I don't know how we can come to consensus with regard to an appraisal until we answer that access question. That is fundamental to our process always when we are talking about disposing of state lands.

Governor Schweitzer said that is not up to us to determine. Jefferson County has determined it. Someone needs to sue and win to reverse that. Frankly, there are probably thousands of miles across Montana that someone would challenge whether it is or is not a county road and as Chris has described for us they would have to go back through the minutes. The status quo prevails unless that is challenged. On that basis, we need to go with what the basis of the county commission is unless somebody were to prevail.

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Mr. Johnson said in that situation I don't know why we wouldn't want to go ahead and put that out to bid at the original appraisal and see if we have any success.

Governor Schweitzer said this is the challenge we are faced with, one appraiser says it is X and another appraiser says it is XX. My frustration with appraisers is depending upon who pays for the appraisal is the result. I understand there is a short list of land appraisers in this area but this is not unusual, 50% of another one. It happens a lot. We've lowered the price a lot. How much did you pay for that appraisal?

Chris Johnson said I don't remember.

Governor Schweitzer said \$4,000?

Chris Johnson said yes.

Governor Schweitzer said \$4,000 and the state is proposing to lower the price by \$46,000. That's a pretty good return already. I guess if no one bids on that we'll find out that it's worthless.

Mr. Morrison said I'd like to hear from DNRC about the disparity in appraisals and any comment about what accounts for the big difference.

Chris Johnson said to sum up, one of the things we are asking for is a delay. It is possible to work out the issues. This is not an insurmountable problem. One of the concerns of Ash Grove is the ability to maintain a buffer zone around the facility and one of the possibilities is whether it is possible to sell in lots or in portions and allow us to acquire the southern portion of the ground which still provides us the buffer zone we desire.

Ms. Sexton said I would note two things, Ash Grove is the surrounding landowner so by default if they purchase the property they would have access. Secondly, the resolution Mr. Johnson referred to has been used by many counties to clear up issues of county roads and public roads.

Jeanne Holmgren, Real Estate Management Bureau Chief DNRC, said I want to give a little bit of background because we did struggle with this in the negotiated rulemaking committee process. We talked about having the second appraisal and review of that second appraisal. That was the process identified under the negotiated rulemaking process. I would also like to say that even though it is a department appraiser we want him to look at it objectively. We want it to be fair, we want to have the same advantage in the marketplace as everybody else. We don't want to go out and set a value so high that we can't get anybody to the bid. That doesn't bode well for us either. We believe it is a fair and objectionable review and appraisal on our part. In looking at setting the rules, we did allow for anybody, even a lessee, to come in and request for an appraisal and have that reviewed. So that is how that fell out and that is why that is our policy and rule for the appraisal. Tom Konency is our appraiser and he can answer questions you may have related to the disparity and the value.

Tom Konency, DNRC, said what it boils down to is one of the most important parts with any appraisal process is comparable sales. I say this because I did to the appraisal first, Mr. Joki did the appraisal following. Except for one, we used different comparables and of course Mr. Joki pointed out these other comparables in the market. I took that into my consideration and that is the revised figure I came up with. But the biggest discrepancy is the use of sales. I don't know what Mr. Joki was thinking exactly, but there were some things that were not addressed and that was part of my questioning what he was looking at. It

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may have been a time factor for him because he was contracted shortly before the deadline. There are two reports there are different comparables except for one, and that can be very important.

Mr. McGrath said would you clarify this issue of whether or not either appraisal took the position that there was access?

Mr. Konency said both appraisals took the position there was access.

Mr. McGrath said okay, assuming that the county resolution was valid this is a public road.

Mr. Konency said correct. That would be the extraordinary assumption that it is.

Mr. Morrison said I am still not sure how you wind up that far apart looking at the same comparables. But with appraisals, you can put it on the market and if you're wrong, it won't sell.

Mr. Konency said that's right. And it is minimally set and with the way things are going in Montana, because it will take a while before it is actually on the market, I wouldn't be surprised if it is higher. The purpose of an appraisal though, the appraiser is involved in the process obviously, but it is supposed to be the market that sets the value, not the appraiser. The appraiser has to determine it and that is the subjectivity. But hopefully he is objective enough when he goes in there he doesn't think about what the value is, let the market determine that, try to decide as best you can what that market sets.

Ms. Sexton said I would note there is housing development near the north end of the property. So there is housing and residential development near the property.

Dick Johnson, Plant Manager Ash Grove, said half million dollars is a lot of money. The DNRC has been very helpful, the appraisal was their person the name came from their list. All we were looking at was to get the price of the property down and make it a little more affordable. It comes out of my capital budget. All we do with the property is protect the plant. What I would like to add is we allow public access on all our property, we have a nature trail along the creek that we built and maintain. People go down and walk. It is difficult to compete against developers with the land frenzy that is going on in northern Jefferson County. The appraisal came out surprisingly much lower than the original one. We were quite happy with that. We were quite upset to find they were only requesting a \$300 drop based on a 50% reduction in the appraisal. These are the situations. If we have to pursue the access we have a good relationship with our county and county commissioners. I don't want to jeopardize anything here but again, the property is extremely well priced right now and it will be a difficult thing for me and my budget to swing.

Motion was made by Mr. Morrison to move forward and offer the property at \$2800 and see how it goes. Seconded by Ms. McCulloch.

Ms. McCulloch said I have to give some points to Ash Grove for their negotiating on this. But here is my dilemma with it. If in fact we do appraisals, and I have not found that our departments appraisals have been off in the five years I have been dealing with this, if we begin to question our own appraisals and second guess those I am afraid that will become the norm for appraisals. That they will always be second guessed. As the Superintendent of Public Instruction I don't want the funds that we can get from this to be spent on second guesses and appraisals. I want that money to be there to go into what we like to call the beneficiaries, what I like to call the kids of Montana, 145,418 of them at this point. That is my dilemma with it. I will vote for this but I do have to give points to Ash Grove for their work on this.

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Mr. Morrison said the only other comment I'd make to Ash Grove about this is we have a lot of interests to balance with this new land bank program. It is critical that we get whatever the top market dollar is for these sales because it allows us to reacquire pieces that are not only going to generate revenue for the trust but will help to consolidate accessible public state land holdings around the state. I hope you understand that although we support the many good things you do in an effort to be a good neighbor in your area, we have a job to do too.

Dick Johnson said there is a good chance that that road will be deemed as a non-accessible road which knocks the price out of the property. We certainly do not want a developer developing that property right across the street from the plant. We've done a good job of keeping a buffer zone, this would totally destroy that. It is really growing up around there and we are having a hard time with that. We have to protect it.

Mr. McGrath said at this point we don't have the ability to have a negotiation. We are setting a minimum price. We have to determine what happens if somebody bids on it or doesn't bid on it. But at this point, Ash Grove has no standing other than anyone else. There may be others interested in this property. We don't know that until we go out and go through the process.

Governor Schweitzer said I may have more or less confidence in our appraisal than appraisals all across Montana because I see lots of them for a lot of private transactions. But the best appraisal is two parties showing up one saying it is worth it and the other one taking the money. I think the market is the point here. If this doesn't get the minimum bid it is likely to come back to us. We do have an obligation to the kids.

A vote was taken on the motion on the floor. Motion carried unanimously.

1105-4 RIGHTS-OF-WAY APPLICATIONS

Ms. Sexton said this month we have 53 applications for right-of-way. Many of them are historic access telephone lines through Triangle and Three Rivers. Historical electric we have Sheridan Electric, Sun River Electric, and Marias. Private road historic access and there is one non-historic road access and a new installation with electricity. The applications are #12208 through 12213 from Triangle Telephone Cooperative for buried telephone distribution lines; #12667 from Robert and Margaret Weydemeyer for a private access road to a single family residence; #12816 through 12825 from Sheridan Electric Cooperative for overhead telephone distribution lines; #13021 through 13030, #13048 through 13059 are from Sun River Electric Cooperative for overhead powerlines; #13259, 13261, 13263, 13265, and 13267 are from 3 Rivers Communications for buried communications cables; #13306, 13310, 13314, 13316, and 13319 are from Marias River Electric Cooperative for overhead electric distribution lines; #13347 is from Triangle Telephone Cooperative for a buried communications cable; #13613 is from David Vanek for a private access road to one single-family residence including access for conducting normal farming and ranching operations; #13614 is from Fergus Electric Cooperative for an overhead single-phase powerline; and #13615 is from Montana-Dakota Utilities for a three-phase overhead powerline. Ms. Sexton said I would like to direct your attention to the non-historic access request, #13613 from David Vanek, I have maps to show you. The applicant is from Lewistown. It is an application for a 30-foot easement, it comes off the highway. Mr. Vanek did have the lease for the state land but lost the lease and he now is asking for access to the family trust which is in the lower right hand corner on your map, it is a small parcel. The compensation would be \$100 for the 30-foot strip, and would be only for construction of a single-family residence and for conducting normal farming and ranching activities. Concern has been

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expressed by neighboring landowners that there is a development intent involved with this. It is our policy that if no other access can be achieved we will consider an easement for access across state land. There is no inherent necessity the Board grant that but it has been our policy that we offer access when no other access is available. There may be an opportunity here for reciprocal access with some other property the Vanek family has where there is inaccessible trust land. We may be able to look at some reciprocal access as another opportunity.

Dave Shipman, Warm Springs Creek Valley, said I have known David Vanek who is applying for this easement since grade school. We know each other very well. His original application was for a 60-foot right-of-way, unrestricted. It went to the office in Lewistown who sent out a letter asking if there were any concerns and we had some concerns and let them know. They got some calls saying the neighbors did not like this and there were things they did not know. They looked at it and reduced it to a 30-foot strip and single family. But we all know what he was really after. It is basically about money. This right-of-way, the access Mr. Vanek has, is the same one I have across the Schnapps' property. It is basically 130 feet. I've been using that to get to my property for agricultural purposes through the Schnapps', then through Vanek's ¼ mile for 45 years. Mr. Vanek has been using that for 27 years because that is when he acquired the 200 acres he has been wanting to sell. We've had no problem at all until he wanted to get as much money as he could for it, to sell it for housing, and the Schnapps' said no we won't give you a right-of-way for that. The other thing is Mr. Vanek claims he doesn't have a legal right-of-way, it hasn't gone to court but historically it has been there. I talked to Mr. Schnapps and said if Mr. Vanek claims he doesn't have a legal right-of-way would you have any problem giving him a legal right-of-way easement for farm and ranch management and he said he has no problem with that. So for the farm and ranch he has I have a right-of-way and he could easily get what would be a legal right-of-way. We've all lived the same life but Mr. Vanek learned that selling houses was more profitable than farming and he sold a little piece along the creek, 23 acres for \$250,000 2½ years go.

Governor Schweitzer said Mr. Vanek wants the State of Montana to give him an easement from our road directly in so he doesn't have to use the Schnapps or perfect an easement.

Mr. Shipman said yes.

Mr. Morrison said where is Vanek's piece on Warm Springs Creek?

Mr. Shipman said it is right where Warm Springs Creek starts. He has a farm corporation with two of his boys and they call it Vanek's Paradise Ranch.

Mr. Morrison said why do you think this easement across our section is significant to Vanek in terms of development? Why is this road across Schnapps not just as good? Is it limited to agricultural?

Mr. Shipman said it is just as good. It is for agricultural.

Ms. Sexton said the request is for one 30 foot and one residence. Including all agriculture. He needs a legal access if he is going to sell the property.

Mr. Morrison said where do you think he wants to develop it?

Mr. Shipman said he would sell it to somebody. He wouldn't have the finances to actually develop it himself, he just wants to get as much money as he can for this 200 acres. It is hearsay, but he has been

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offered by several of the neighbors, just to get it cleaned up, two thirds of what he could get from an individual who wants to build a home there.

Governor Schweitzer said a prescriptive easement simply means you have been using it for some period of time. Is the prescriptive easement only after it has been challenged in court? Or is it presumed a prescriptive easement until it has been challenged?

Mr. McGrath said it is not an easement until the court determines it is, technically.

Mr. Morrison said the way the court determines it is based on whether it satisfies prescriptive easement criteria.

Governor Schweitzer said the way it works out in that country is if you have been using it for years, coming and going as you please, somebody would have to take action to stop you from using it. The assumption is you have a right to use it and it has been upheld by Montana law. So if you wanted to develop this property, that easement Vanek has there isn't one that has been granted by anybody in writing saying you can do this but only if you put one house on there. I don't know they can challenge his right to use that property and if he decides to build two houses or sixteen houses, he still comes across that property. Is that not right?

Ms. Sexton said if somebody wanted to buy it there is not legal access. Anyone looking to purchase the property would see if there were a deeded easement on the deed and there is not. Since there is not, many buyers would not be interested because there is not legal access to the property.

Mr. McGrath said even if you did have an easement prescription it is not for all uses, it is for what it has historically been used for.

Mr. Shipman said that's why I said the Schnapps' said they would give him a legal access easement to our property for farm and ranch management. But not for home building. That's what they said.

Mr. Morrison asked has there been any discussion about limiting the potential uses of this right-of-way?

Ms. Sexton said the only thing we are limiting it to is just one family residence, and it is only 30 feet wide if there were a subdivision that is not sufficient, it has to be 60 feet wide. So they would have to come back to the department for widening the easement if that were to take place. For your information, we are revising our access-easement policy because there are a lot of land use changes in Montana. There have been questions about reciprocal access. We will come to the Board in a couple of months with suggestions for revising the policy. This is an issue where other landowners have not given him access then the state comes and we do have a policy but we don't have many guidelines or restrictions in those policies. We just ask what the value of the land would be in an appraisal and that is a short piece, its only \$100 for the right-of-way on this property.

Mr. Morrison asked is our income on our section here generated by grazing fees?

Ms. Sexton said there is some farming as well. Mr. Vanek did have that state lease but he doesn't any longer.

Mr. Shipman said he has three miles of property along the same highway that is Vanek's. Vanek's boys don't want him to sell anything. Part of this, a mile and a half, is absolutely his to do as he absolutely

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pleases. The other two and a half is in the family corporation. We are saying why does the state have to get involved when this man can sell property all over that valley.

Ms. Sexton said I would note that an encroachment permit would be required from the state which has been gained but in the name of the state not Mr. Vanek. So we'd have to turn that permit over to Mr. Vanek so he has access off the state highway.

Mr. Shipman asked if the state had gotten letters on Friday from the other neighbors?

Ms. Sexton said we have had some letters and some phone calls. They are in the file.

Ms. Holmgren said I don't know if I got the letters on Friday, but the issues were associated with the width of the road, development of the property and in mitigating those concerns we reduced it to 30 feet and one single family residence and the allowance of agricultural use, the historic use of the land.

Mr. McGrath said Ms. Sexton talked about the potential for a reciprocal access on a different parcel that is an isolated parcel that Vanek may be willing to negotiate. Would you elaborate on that?

Ms. Sexton said we just recently found out about that and it would be an opportunity if the Board would like us to negotiate with him for some reciprocal access. It is an isolated parcel on trust land that is surrounded or has access through his land and we could gain access to our isolated parcel in reciprocation for this access. That is a possibility for the Board to consider.

Mr. McGrath said I would suggest then and make the motion that we approve the rights-of-way applications, segregate this one out, find out if there is potential to negotiate a reciprocal access so we know if we have some different value, and bring it back to the Board at a later date.

The motion was seconded by Mr. Johnson.

Governor Schweitzer said what you're saying is we will approve the other easements but not this one and we'll see what goes. I like that concept. I don't believe the State of Montana should be in the position of offering easements when no other private landowners do. We are supposed to manage this land for the best interest of all the people in Montana. If we get ourselves in the position where we are offering easements and none of the other private landowners in the area are, I am not sure we're getting our best value. We need to be consistent with that. I am anxiously awaiting some new policy relative to these easements.

Ms. Sexton said we are working on them. Direct access as well as reciprocal access.

Governor Schweitzer called for the vote. The motion carried unanimously.

INFORMATION ITEMS

1005-12 TRUST ADMINISTRATION COSTS

Ms. Sexton said this first information item is just a review for Board members. As you know, there is an interim EQC sub-committee that is reviewing the issue of how trust land management is funded. There have been several Attorneys General opinions regarding this. The first was in 1967 from Attorney General Forrest Anderson and in his opinion it was allowed and expected, in fact, that management fees

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be deducted from revenues generated off trust lands. That was also reviewed later by Attorney General Woodahl. Recently the Governor asked Attorney General McGrath for an opinion. He issued a Letter of Consult in September 2005 that upheld the 1967 opinion from Mr. Anderson that it is appropriate to deduct administrative costs. The only exception would be the Morrill Trust. We have been in negotiations with the Office of Budget and Program Planning and also with University System Higher Ed representatives discussing Morrill. We are looking at ways to make sure that the administrative costs for Morrill are covered outside of deducting them from the revenues and not taking it from other trusts as well. We are working on that with the University System and we will make a proposal to EQC in late January, 2006. There have been counter opinions by Greg Petesch and LeRoy Schramm, but it is our opinion upon review of all the legal aspects and also looking at the A.G. opinions and the Letter of Consult that it is appropriate to do what we are doing. This is just an explanation of this. I would note also that eleven of fifteen states, including the State of Washington, have the same Enabling Act and they currently fund their administrative expenses out of revenues generated from trust management activities. Arizona has proposed legislation to change their funding from general funding to taking funding out of trust revenues. We feel we are on solid legal ground. We are looking at Morrill so that can be clarified and there may be some proposed legislation regarding Morrill but this is just an update of administrative cost issues. Again, there is the sub-committee looking into this. In late January they will be looking at university trusts and in the spring they will be looking at the common schools trust.

1005-14 STATE FOREST LAND MANAGEMENT PLAN IMPLEMENTATION
MONITORING REPORT

Ms. Sexton said this is a mandated review of the monitoring report. We will have a brief power point presentation of our management activities for years 2001 through 2005.

Mike O'Herrin, DNRC Forest Management Bureau, said I am in the planning section and we are responsible for compiling the monitoring report over the course of the five year monitoring period. The report was published last month. I will present a brief overview of the information contained in the report.

The State Forest Land Management Plan (Plan) was developed in the early 1990's and approved by the Board in 1996, the draft EIS, final EIS, and the Record of Decision. The report covers both the broad status of the Plan in terms of implementation and effectiveness and we have updates on the monitoring of individual resources such as biodiversity, silviculture, roads, soil, wildlife, watershed management which are also contained in the report. The big step over the course of this monitoring period was adopting administrative rules. Converting the Plan into administrative rules to provide consistent policy and direction. The rules adopt the exact same monitoring components as the Plan did. The rules are incorporated into every timber sale. Rules are addressed through early planning, MEPA analysis, and then into specs or mitigations incorporated into the sale contracts. Our field foresters act as the sale administrators. In most cases the same foresters who developed, analyzed, wrote up the sale, and did the public involvement are typically the sale administrator too, so they know the project very well from its inception all the way to the administration of the contracts. In the report we have reports on biodiversity, field reviews, we talk about old growth a little bit. Old growth has been evolving issue since adoption of the Plan. We had a conceptual definition at first then we used a working definition based on age. Through rulemaking we adopted the quantitative *Green et al* definition based on both age and number of large trees. It is also specific to habitat and cover types.

Silviculture. Obviously we are in the business of silviculture and we look at regeneration success. We have a very good success rate for survival of our plants and seedlings, 80-85%.

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Forest Improvement is a big part of our program. We fund several efforts through F.I., planting, thinning, browse protection, cone collection, burning, weed spraying, and biological control of weeds. We have planted over 5,000 acres and thinned over 8,600 acres.

In the Forest Plan the selected alternative was Omega and we predicted the proportion of even-aged treatments we'd be doing, combining clear cut, seed tree and shelter with treatments. We call them under the umbrella of even-aged. In the first monitoring period we weren't doing well in trying to reach those target numbers but we have made some progression towards those numbers. The original targets were 40%. We were at 14% in the first monitoring period and we are up to 31%. We are moving towards what we predicted as far as even-age treatments to accomplish our desired future conditions.

Timber sold and harvested. Over the course of the monitoring period you see a rising trend towards the end of the period because we have a higher sustained yield expectation now. Volume harvested went up too. That has a delayed effect because volume actually harvested reflects the sales from the last few years.

Timber revenue. Another increasing trend towards the end of the monitoring period. The sustained yield went up a bit and the market conditions are excellent now for timber.

Watershed and road management. We looked very carefully at watershed and road management. We have watershed inventories on over 58,000 acres, soil monitoring on 74 projects including two major salvage projects, the Sula and Moose Fire. We did extensive soil monitoring and recording on that. We do BMP audits both internal and interagency. The bulk of our BMP audits are the internal audits. We only had about four or five external interagency BMP audits over the last couple of periods because they base the amount of audits they do statewide on the amount of ownership compared to the entire state ownership. They do a proportional amount of audits based on statewide owners. We scored very high in BMPs both internally and with the interagency audits, 97-98%. We do soil monitoring on five timber sales internally and we also have monitoring reports that are separate and distinct from this monitoring report, they are incorporated into it. In fact, this year we published a monitoring report that covered 74 projects since 1988. Soil and watershed are big deals for forestry and resource conservation, but in general BMPs and mitigation measures that we use to minimize detrimental soil impacts were effective in protecting soil resources and controlling erosion and sedimentation.

Fisheries. A very state-of-the-art and growing program. We have fish habitat inventories in coordination with the Department of Fish, Wildlife and Parks. Ten streams are currently being inventoried and monitored, looking at habitat components and population trends. We also have a fish passage assessment project which is run on an GIS database and we're looking at 264 stream crossing surveys. We get out there with our fisheries biologists, field foresters, watershed experts and look at the actual stream crossings. We measure it with state-of-the-art techniques and are leading the way in the state as far as technology and how we are getting out there and looking and surveying these stream crossings. We prioritize the stream crossings, which ones that need to be addressed, based on what we're finding in the surveys.

Threatened and endangered species. We have monitoring reporting. The Swan Valley Grizzly Bear Conservation Agreement is in place in the Swan, there is an annual review and report associated with that. We meet twice a year with the other agencies involved in the agreement, the Fish and Wildlife Service, Plum Creek, and the Forest Service. They meet in the Swan and talk about what bears are doing, how forest management impacts bear populations, what they are learning and what we can incorporate into our

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program based on immediate results of monitoring. We also have a report on snag, snag recruitment and woody debris.

Weed management. We completed the 6-year integrated management agreements with all the county districts. We trained twenty field technicians for weed identification and herbicide application. We apply integrated weed management practices on all our projects including the use of weed-free seed, equipment washing, grass seeding of roads, herbicide, and biological control measures. We have populations of the bug which eats spotted knapweed, and we loan the bugs to other landowners.

In summary, monitoring demonstrates we are successfully implementing the Plan and now the rules. Project review demonstrates we are succeeding in a depth of management. What is really important to understand is we don't just monitor, find things out and measure them and report them to the Director and the Land Board. We actually want to take results we are finding on the landscape and go ahead and learn from them and implement new things or new techniques on the following timber sales. For instance, on the Sula Salvage Sale and the Moose Salvage Sale, we have separate sales monitoring reports for both of those projects. We got out there and looked and measured transects, looked at skid trails, and looked at areas that were harvested/were not harvested and compared the two. We looked at storm events because Sula had a lot of rain come in when the bare mineral soil was exposed. We had some impacts due to those storms but as far as the forest management, we felt very good about how we were able to conserve the soil and protect it based on the different techniques applied on the project. We learned the next time we have a big fire and salvage project we will be able to come to the Director and Land Board and say here is what we're learning on Sula and Moose and here's what we are learning to implement. Those are detailed in the report.

On-going and expanding programs in all resource areas. We provide for that continued improvement. We are trying to improve our forest inventory techniques right now. We are looking at the technology that is evolving, there are some good different electronic devices for getting out there and incorporating the software in the field forester's crews so they can accurately measure the forest and then incorporate it back into our forest inventory. We are also looking at what revisions of any administrative rules or the Plan itself have to happen over the long term.

Mr. McGrath said it is very impressive that in the years I have been here what the planning process has been and how the department follows that planning process and the good management practices we have undertaken in terms of our timber. It's good work and we appreciate it.

Governor Schweitzer said I'd like to echo that I think that Montana's management of our timberlands is one that probably other states would like to take note of.

1105-5 ABSENTEE PARTICIPATION

Ms. Sexton said we have discussed this with Land Board staff members over the past year. I have had questions about calling in, proxy, deputy representation and so on. We are working through with the Land Board staffers looking into the different options. We are also waiting for the new audio system in the old Supreme Court Chambers and once that is up and running we will know what kind of capability it has and perhaps can come with a proposal as to how absentee participation might proceed.

Motion to adjourn was made by Mr. Morrison. Seconded by Ms. McCulloch.